IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 253 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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THAKOR HUNSAJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 253 of 1994
MR BS PATEL for Appellant No. 1
MR KG SHETH, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. By filing this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated December 24, 1993 rendered by the Ld. Addl. Sessions Judge, Mehsana in Sessions Case No. 197/1993, by which he is convicted of the offences punishable under Sections 302 as well as 324 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code and simple imprisonment for six months for the offence punishable under Section 324 of the Indian Penal Code.

2. The complainant i.e. Kantaben Babaji Thakor is resident of village Ranela, Taluka Chanasma, District Mehsana. The incident in question took place on March 10, 1993 wherein her husband - Babaji Khodaji Thakor lost his life. According to the prosecution, on the date of incident at about 9.00 p.m. there was a dispute relating to tieing of goat on the road between Viraji Vastaji and the appellant. At that time the deceased in company of his wife Kantaben was going to a shop for the purpose of purchasing Beedies. According to the prosecution, the deceased intervened in the dispute which was going on between Viraji Vastaji and the appellant. The prosecution has claimed that at that time the appellant caused an injury on chest of deceased and when witness Pratapji Khodaji Thakor tried to save the deceased, the appellant inflicted knife blow on finger of his left hand. During the course of incident others had intervened and, therefore, the appellant had run away from the place of incident. The deceased was removed to Mehsana dispensary where he was declared dead. The complaint with regard to incident was lodged by Kantaben Babaji Thakor i.e. wife of the deceased, which was investigated by Police Inspector, Chanasma Police Station. During the course of investigation, the Investigating Officer had recorded statements of the witnesses who were found conversant with the incident and had sent the dead body for post mortem examination. Pursuant to voluntary disclosure made by the appellant, the knife which was used by him in the incident was discovered under a Panchnama which was prepared in presence of Panch witnesses. The incriminating articles which were seized during the course of investigation were sent for analysis. On completion of investigation, the appellant and two others were charge-sheeted of the offences punishable under Sections 302, 324 read with Section 34 of the Indian Penal Code in the Court of the learned Judicial Magistrate First Class, Chanasma. As the offence punishable under Section 302 of the Indian

Penal Code is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Mehsana for trial where it was numbered as Sessions Case No. 197/1993.

3. Charge at Exh. 9 was framed by the learned Judge against the accused of the offence punishable under Sections 302, 324 read with Section 34 of the Indian Penal Code. The charge was read over and explained to the accused, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Kantibhai Babaldas Patel P.W.1 Exh.15, (2) complainant Kantaben Babaji Thakor, P.W.2 Exh. 20, (3) Kankuben Viraji Thakor, P.W. 3 Exh. 21, (4) Pratapji Khodaji Thakor, P.W. 4 Exh. 22, (5) Abhesing Gopalji P.W.5, Exh.39, (6) Imamkhan Bhikhankhan Chauhan, P.W. 6 Exh. 41 and (7) Vijaysinh Chhatrasinh Gohil P.W. 7 Exh. 43 to prove its case against the accused. The prosecution also produced documentary evidence such as post mortem notes prepared by Dr. Patel, certificate of injury of witness Pratapbhai, map of place of incident, Panchnama of place of incident, inquest report, complaint filed by witness Kantaben, report of the serologist, etc. to prove its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the accused circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure Code, 1973. In their further statements, the accused stated that the case of the prosecution against them was false, but did not examine any witness in support of their defence.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that the deceased had died a homicidal death. The learned Judge after referring to the evidence of eye witness Kantaben Babaji Thakor, witness Pratapji Khodaji Thakor and witness Kankuben Viraji Thakor held that it was proved by the prosecution beyond reasonable doubt that the appellant had inflicted knife blow on the chest of deceased which resulted into his death. The learned Judge also held that it was proved by the prosecution that the appellant had caused injury by knife to witness Pratapji Thakor. On appreciation of evidence of Dr. Patel the learned Judge held that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death and, therefore, the appellant had committed offence punishable under Section

302 of the Indian Penal Code. The learned Judge deduced that no reliable evidence was led by the prosecution to establish that the original accused nos. 2 and 3 had shared intention with the appellant either to commit murder of deceased Babaji or to cause injury to witness Pratapji Thakor and, therefore, they were entitled to be acquitted. In view of the above referred to conclusions the learned Judge has convicted the appellant under Section 302 as well as under Section 324 of the Indian Penal Code and acquitted original accused nos. 2 and 3 vide judgment dated December 24, 1993. The learned Judge heard the appellant regarding imposition of sentence and has sentenced the appellant to rigorous imprisonment for life for the offence punishable under Section 302 and simple imprisonment for six months for the offence punishable under Section 324 of the Indian Penal Code vide judgment dated December 24, 1993, which has given rise to the present appeal.

6. The only point argued by Mr. B.S. Patel, learned counsel for the appellant is that the evidence on record does not establish that the appellant had any enmity with the deceased and as there was no intention on the part of the appellant to inflict that particular bodily injury, which in the ordinary course of nature was sufficient to cause death, the conviction of the appellant should be altered to one under Section 304 Part-I or Part-II of the Indian Penal Code and punishment of imprisonment already undergone by him should be imposed on him. In support of his submission, the learned counsel placed reliance on the decision in R.C. Atodaria v/s. State of Gujarat AIR 1994 S.C. 1060.

7. Mr. K.G. Sheth, Ld. APP for the State pleaded that the prosecution evidence and more particularly the evidence of Kantaben, who is wife of the deceased as well as injured Pratapji Thakor establishes that the intention of the appellant was to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause his death and, therefore, conviction of the appellant under Section 302 of the Indian Penal Code should be upheld.

8. We have heard the learned counsel for the parties and reappreciated the whole evidence on record. From the evidence of witness Kantaben Babaji Thakor, who is wife of the deceased, it is evident that a quarrel was going on between Viraji and the appellant regarding tieing of goat on road by Viraji and that at that time Kantaben and her deceased husband were passing on the road, as they were going towards a shop for the purpose of purchasing

Beedies. Her evidence further shows that at that time her husband had intervened in the quarrel and, therefore, the appellant had inflicted a knife blow on the chest of her deceased husband. Her evidence also establishes that witness Pratapji had tried to intervene in the incident and the appellant had also caused injury to Pratapji by means of the knife. Similar evidence is tendered by injured Pratapji Khodaji Thakor. The evidence on record unerringly establishes that the appellant had given one blow and that there was no dispute between him and the deceased. Further it has come on the record of the case that the appellant himself was injured in the incident and that he was treated at Primary Health Centre, Chanasma, District Mehsana on March 11, 1993. The medical certificate which is produced by the appellant at mark 45/2 would show that the appellant had suffered a cutting wound as well as contusion and his case was that he was assaulted by Thakor Viraji, Thakor Jayantiji and the deceased. It is relevant to notice that after primary treatment, the appellant was asked to take further treatment at General Hospital, Mehsana. No explanation is offered by any of the prosecution witnesses regarding injuries sustained by the appellant and, therefore, the genesis of the incident becomes doubtful. As observed earlier the appellant had inflicted only one stab injury and that too after sudden quarrel. Under the circumstances, intention to cause death cannot be spelt out. In R.C. Atodaria (supra) the appellant had inflicted one stab injury that too after sudden quarrel and fight. On appreciation of evidence led by the prosecution witnesses, the Supreme Court has held that intention to cause death was not spelt out and, therefore, the Supreme Court altered the conviction of the appellant under Section 302 to one under Section 304 Part-II of the Indian Penal Code. In Randhir Singh v/s. State of Punjab, AIR 1982 S.C. 55 it was found by the Supreme Court that the appellant had inflicted one injury on the deceased. It was also found that some altercation had taken place before the incident. The Supreme Court after referring to its earlier decisions on the point, has held that in order to bring the case within the para.III of Section 300 of the Indian Penal Code, it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. In other words, according to the Supreme Court it must be established that the injury found to be present was the injury that was intended to be inflicted and in absence of such evidence the accused cannot be convicted under Section 300 of the Indian Penal Code.

9. Applying the principle laid down by the Supreme Court to the facts of the present case, we find that the record does not establish that there was enmity between the appellant and the deceased. The deceased had intervened in a quarrel and, therefore, the appellant had given one knife blow to the deceased. The record does not establish that the appellant had taken advantage of the situation and caused another injury to the deceased. Therefore, it is difficult to come to the conclusion that there was an intention on the part of the appellant to inflict that particular bodily injury, which in the ordinary course of nature was sufficient to cause death of the deceased. Having regard to the totality of the circumstances appearing from the evidence of prosecution witnesses, we are of the opinion that the conviction of the appellant under Section 302 of the Indian Penal Code deserves to be altered to one under Section 304 Part-I of the Indian Penal Code.

10. The record of the case further shows that the appellant has actually undergone sentence of 7 years and 5 months and with remissions the sentence undergone by him is 9 years and 5 months. Therefore, we are of the opinion that interest of justice would be served if the appellant is punished to the imprisonment which he has already undergone while altering his conviction to one under Section 304 Part-I of the Indian Penal Code.

11. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant u/S. 302 of the Indian Penal Code is set aside. Instead the appellant is convicted u/S. 304 Part-I of the Indian Penal Code as well as section 324 of the Indian Penal Code. The appellant is sentenced to period already undergone by him pursuant to his conviction u/S. 302 of the Indian Penal Code, which was recorded by the Ld. Addl. Sessions Judge, Mehsana. As the appellant has undergone punishment imposed on him for the offence punishable u/S. 304 Part-I and section 324 of the Indian Penal Code, the authorities are directed to release him forthwith unless his presence is needed with reference to any other case.

Muddamal to be disposed of in terms of directions given by the Ld. Addl. Sessions Judge in the impugned judgment.

Office is directed to send writ to the Superintendent, Central Jail, Ahmedabad, immediately for compliance.

[J.M. Panchal, J.]

[Akshay H. Mehta, J.]

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